

THE ROLE AS COURT-APPOINTED COUNSEL

There is no difference between the obligations of a retained attorney to her client than to the obligations of a court-appointed attorney to her client, unless the court-appointed attorney's obligations are specifically restricted by the court.

Appointment of an attorney to represent an incapacitated adult is required when the original petition is filed under Ariz. Rev. Stat. 14-5303 and/or 14-5401.01, and it is a recommended practice for the fiduciaries activities to continue to be monitored. (*Guardianship Monitoring: A National Survey of Court Practices* by Naomi Karp, AARP Public Policy Institute and Erica Wood, ABA Commission on Law and Aging, #2006-14, June 2006).

Under a general appointment of counsel, as this was, any court-appointed attorney is obligated, whether it is the undersigned or not, to monitor the activities of the fiduciaries and ensure they follow the law and court rules.

There is virtually no Arizona case law dealing with what a Title 14 court appointed attorney must do. Some guidance by analogy might be found in Ariz. Rev. Statutes 14-5312.01 and 36-537. Certainly the requirements of 14-5303 and/or 14-5401.01 must be met and it would be the court-appointed attorney's responsibility to object if they were not met. Subsequent to the appointment of a fiduciary, the Court retains broad discretion to impose protections for the ward and his assets. Ariz. Rev. Stat. Sections 14-5402, 14-5406, 14-5408, 46-455, 46-456

Court appointed attorneys are not rubber-stamps bestowing credibility on a *fait accompli*. Their job is much more difficult. The court-appointed attorney is the voice for those who cannot speak, the mind for those who can no longer think-- the last defense against losing all control of their assets, their liberty and their person.

There is a long line of United States Supreme Court cases which protect the right of the individual against loss of freedom and against personal invasions such as unwanted medical treatment. *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 129-130, 105 N. E. 92, 93 (1914). *In re Quinlan*, 70 N. J. 10, 355 A. 2d 647, cert. denied sub nom. *Garger v. New Jersey*, 429 U.S. 922 (1976); *Cruzan V. Director*, 110 S. Ct. 2841, 497 U.S. 261 (U.S. 06/25/1990); *O'Connor V. Donaldson*, 95 S. Ct. 2486, 422 U.S. 563 (U.S. 06/26/1975). Yet the due process and other protections promised in these cases and by Arizona Statutes cannot be fulfilled without the presence of qualified, competent court appointed counsel who actually do their job.

Any court-appointed attorney is also obligated to make sure the activities of the fiduciaries—even when allowed under applicable statutes and rules—are in the best interests of the ward.

Any court-appointed attorney is obligated to make sure the actions of the fiduciaries, and their counsel, do not fall below the applicable standard of care for fiduciaries considering any specialized training they might have.

Some counties routinely discharge the court appointed attorney once a guardian and/or conservator has been appointed on a permanent basis following *Matter of Ray's Estate*, 25 Ariz. App. 40, 42, 540 P.2d 771, 773 (1975). Others do not.